

Letter of Findings: 09-0612
Gross Retail Tax
For 2004 through 2008

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ISSUE

I. Unreported Retail Sales – Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-2.5-8-8(a); IC § 6-2.5-8-8(b)(1); IC § 6-8.1-5-1(c).

Taxpayer argues that it was not required to collect sales tax on its sale of cabinets because it was primarily engaged in wholesale transactions.

STATEMENT OF FACTS

Taxpayer is or was in the business of selling household cabinets and countertops. The Department of Revenue (Department) conducted an audit review of Taxpayer's business and tax records. The audit found that Taxpayer had sold cabinets to retail customers but failed to collect sales tax.

Taxpayer first registered for sales tax purposes July 2002. However, the sales tax account was closed August 2004.

The Department's audit concluded that Taxpayer continued to sell cabinets through 2009 and that there was no evidence of exempt transactions. Therefore, the audit assessed taxpayer for additional sales tax based on the "best information available." Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives stated the basis for the protest. This Letter of Findings results.

I. Unreported Retail Sales – Gross Retail Tax.

DISCUSSION

Taxpayer disagrees with the assessment emphasizing that it was only a "Wholesale Distributor." Taxpayer states that it simply ordered cabinets and countertops from manufacturers and arranged for delivery to its wholesale customers. Taxpayer admits that, "there were a few instances where a retail sale was made" and it was "confident the amounts [of sales tax] calculated and paid are correct."

Taxpayer states that it attempted to establish a retail business but that "the business continued to decline and... sustained a loss of approximately \$150,000... for the year 2005."

At the time of the audit in early 2008, the Department's representative visited taxpayer's location, found the business "open," and met with the owner. Taxpayer's representative stated that he was merely in the process of closing down the business operation, that the new owner of the location "agreed to let... others stay in the building until they could find another place for their items or until [the new owner] acquired someone to lease the building."

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

Specifically, IC § 6-2.5-2-1 provides as follows:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Nonetheless, wholesale purchasers may avoid paying sales tax if the purchaser issues the vendor an exemption certificate. IC § 6-2.5-8-8(a) states that, "A person authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax." IC § 6-2.5-8-8(b)(1) states that "the following are the only persons authorized to issue exemption certificates... retail merchants, wholesalers, and manufacturers, who are registered with the department..." (Emphasis added).

Essentially, Taxpayer argues that it collected and paid all the sales tax necessary because it was primarily engaged in wholesale transactions and that it ceased conducting business in 2004 or 2005. As a threshold issue, it is the Taxpayer's responsibility to establish that the proposed tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Taxpayer provided sales records for 2004 and 2005. The 2004 records indicate that taxpayer had sales of approximately \$400,000 that year and \$300,000 in 2005. These records differentiate between "exempt" sales and "retail" sales. Presumably, taxpayer believes that "exempt" sales includes wholesale transactions and "retail" designates sales for which it was required to collect and pay sales tax. During the hearing, Taxpayer's representative indicated that its local accounting firm retained copies of the necessary exemption certificates verifying that a portion of the 2004 and 2005 sales were exempt from tax. However, upon inquiry, the accounting firm stated that he "never had exemption certificates in my file. All I have are summary activity reports."

Tellingly, despite Taxpayer's admission that it had entered into approximately \$700,000 in 2004 and 2005 sales, Taxpayer failed to file income tax returns for those periods. In truth, there is no indication that Taxpayer ever filed Indiana income tax returns.

Taxpayer's representative has provided copies of recent bank accounts purporting to establish that the business "had very little income other than social security since June of 2006." However, the bank records supplied are personal bank records; taxpayer failed to supply business tax records.

Taxpayer admits selling cabinets to retail customers. Publicly available records indicate that Taxpayer's representative petitioned the local municipality in May 2005 to "legitimize his cabinet retail operation by rezoning from 13 to GB [and]... it is not clear how this commercial use was allowed to develop in the 13 [industrial] zone." The report further indicates that, "Staff suspects that over time the business changed from a primarily wholesaling operation to a retail store." In addition, phone records indicated that Taxpayer continued to hold itself out as a "Cabinet Center" through and until 2009.

Based upon the information available, it is not possible to determine with any certainty the nature and extent of Taxpayer's business operations, the number and amount of taxable sales, or the exact date on which Taxpayer conducted its final retail transaction. It is possible to conclude that taxpayer has failed to prove that the original assessment was incorrect. Under IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Taxpayer has raised what may or may not be legitimate, verifiable concerns but it has failed to prove the assessment wrong.

FINDING

Taxpayer's protest is respectfully denied.

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